UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

HELEN LITTLEFIELD,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-277-P-C***
	)	
YORK COUNTY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant moves for summary judgment in this case in which the plaintiff asserts claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*., and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* I recommend that the court grant the motion only as to the request for injunctive relief.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v.*

Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The plaintiff worked for the defendant as an "emergency telecommunicator (dispatcher)" from January 5, 1987 through the time period giving rise to the events that form the basis of her complaint. Statement of Material Facts in Support of Motion for Summary Judgment by Defendant York County ("Defendant's SMF") (Docket No. 8) ¶¶ 1-2; Plaintiff's Opposition Statement of Material Facts ("Plaintiff's Reply SMF") (Docket No. 12) ¶¶ 1-2. She has had severe arthritis in her hip for many years and underwent hip replacement surgery in November 1999. Affidavit of Helen Littlefield ("Plaintiff's Aff.") (Docket No. 16) ¶ 3.[1] Beginning in 1997, the pain in her hip became

[1] The defendant has not responded to the statement of additional material facts submitted by the plaintiff with her opposition to the motion for summary judgment. Accordingly, to the extent (continued...)

so severe that any walking or climbing of stairs was painful, and this pain became severe toward the end of 1997. *Id*. ¶ 4. Even with the benefit of medication, the pain became intolerable when she walked more than 100 feet; she avoided climbing stairs unless it was absolutely necessary. *Id*. Eventually she began to use a cane to walk even short distances. *Id*. ¶ 7. Her arthritis significantly restricts the duration, manner and condition under which she can walk and climb stairs as compared to the ability of the average person in the general population to perform these activities. Affidavit of Manuel Rodriguez, M.D. ("Rodriguez Aff."), attached to Affidavit of Peter L. Thompson, Esq. ("Thompson Aff.") (Docket No. 15), ¶ 6.

In order to reach the dispatch center where she worked, which was located in the basement of the York County Courthouse Annex, the plaintiff was required to walk down two flights of stairs totaling ten steps. Defendant's SMF ¶ 11; Plaintiff's Reply SMF ¶ 11; Plaintiff's Aff. ¶ 8. At the beginning of January 1998 the plaintiff informed her supervisor, Sandra Murray-Ronco, about the pain she was suffering from her arthritis and her inability to use the stairs to the basement location of the dispatch center. Plaintiff's Aff. ¶ 8. At this time the basement was only accessible by stairs. *Id*. ¶ 9. The plaintiff told Murray-Ronco that it was extremely painful for her to climb and descend the stairs and asked Murray-Ronco to speak to the county administrator about having an elevator that had been installed to provide handicap access to the basement repaired. *Id*. ¶¶ 8-9. The elevator had been left in a state of disrepair for years. *Id*. at 9. Murray-Ronco told the plaintiff that she would look into it. *Id*. When she did not receive a response from Murray-Ronco or the county administrator, the plaintiff again asked that the elevator be fixed because she could not longer use

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[1](...continued)
that those facts are appropriately supported by record references, they are deemed admitted. Local Rule 56(e).

the stairs. *Id*. ¶ 10.

The May 15, 1997 minutes of the York County Pro-Active Safety Committee reflect its receipt of a letter from the chief deputy of the York County Sheriff's Department stating that the elevator to which the plaintiff later referred "is bent and doesn't work." Defendant's SMF ¶ 5; Plaintiff's Reply SMF ¶ 5. The minutes of the October 27, 1997 meeting of this committee state that the elevator "can't be totally repaired. Replacement is structured into the 1998 fiscal budget." *Id*. ¶ 7.

On March 1, 1998 the plaintiff tendered a written letter of resignation to Murray-Ronco that stated, *inter alia*, that she would "be leaving on March 15" and that she

> did not intend to resign until the end of the year, but due to a very painful problem with arthritis in my back and hips, I can no longer handle the stairs that are necessary to reach the communication center. As the County is not in compliance with the American Disabilities Act [sic], I find it necessary to terminate my employment.

Id. ¶¶ 8-9. The letter went on to state that the plaintiff had a doctor's appointment on March 2, 1998 and that she

> may find that he will recommend a restricted work week until the elevator is made operable. If that is the case, I may be able to continue to work on a limited bases [sic]. If the County will not allow a restricted work week, possibly only two days a week, then I will be done on the date specified above.

Id. ¶ 10. By a memorandum dated March 2, 1998 Murray-Ronco informed the York County Commissioners that physical impairments and lack of handicap accessibility prompted the plaintiff's resignation. *Id*. ¶ 13. On March 4, 1998 the York County Commissioners voted to accept the plaintiff's resignation, effective May 31, 1998. *Id*. ¶ 15. Also on that date the commissioners, upon Murray-Ronco's recommendation, voted to grant the plaintiff probationary employment as a reserve

dispatcher effective June 1, 1998. *Id*. ¶ 16.

The minutes of the safety committee meeting for March 20, 1998 state that the chairman "will talk with . . . [the] County Administrator[] about getting bids again for the chairlift for handicap access in the Communications area." *Id*. ¶ 17. In a letter dated March 23, 1998 to the York County Commissioners, the plaintiff's attorney wrote, *inter alia*:

> I have been retained by Helen Littlefield to look into the problems she has been having obtaining requested accommodations for her arthritis. . . . Based on the limited information I have at this time, it would certainly seem that fixing the courthouse elevator would be a reasonable accommodation for Mrs. Littlefield's disability.

Id. ¶ 18. On March 27, 1998 the York County Commissioners sent out a request for bids for an annex chair lift, requesting sealed bids no later than April 22, 1998. *Id*. ¶ 20.

By letter dated April 8, 1998 the plaintiff's attorney again wrote to the York County Commissioners, stating in part:

> If, for some reason, the County believes that Mrs. Littlefield's request that the elevator be fixed is unreasonable, I would be more than willing to sit down with you to determine whether there are other possible ways in which she can resume her full-time work schedule without having to climb stairs. . . . Mrs. Littlefield hereby withdraws her letter of resignation, as her motivation to resign in the first instance stemmed from the failure of the County to accommodate her limitations.

Id. ¶ 21. In a letter dated April 9, 1998 the county administrator stated that the April 8 letter had been forwarded to the county's insurers "for response," that "[w]e presently are seeking bids for the replacement of the existing chair lift," and that he could not "offer a firm resolution at this time." *Id*. ¶ 22; Exh. 13 to Affidavit of David R. Adjutant in Support of Motion for Summary Judgment by Defendant York County ("Adjutant Aff.") (Docket No. 6).

By letter to the county administrator dated April 10, 1998 the plaintiff's attorney asked

whether the county acknowledged that the plaintiff "has a disability under the American's [sic] with Disabilities Act requiring reasonable accommodation" and, if so, whether the county took the position that it could not accommodate the plaintiff "short of going through a lengthy bid process to have the elevator fixed." Exh. 14 to Adjutant Aff. If so, the attorney stated, "we take the position that alternative accommodations should be explored immediately." *Id*. The county did not respond to this request. Thompson Aff. ¶ 4.

The county received one sealed bid dated April 17, 1998 for a vertical platform wheelchair lift. Defendant's SMF ¶ 24; Plaintiff's Reply SMF ¶ 24. The minutes of the commissioners' meeting on April 22, 1998 indicate that "[i]t is further noted that another chair glide or similar device is not acceptable as it would not accommodate an individual who is wheelchair dependent." *Id*. ¶ 25. In a memorandum to the commissioners dated April 28, 1998 Murray-Ronco asked that the plaintiff be allowed to rescind her resignation and return to full-time duty the following week; this request was approved at the commissioners' meeting on April 29, 1998. *Id*. ¶¶ 26, 29. Also at the April 29 meeting, the commissioners voted to accept the bid to replace the chair lift. *Id*. ¶ 29. On April 30, 1998 the county administrator submitted a purchase order to the bidder for the wheelchair lift and asked the bidder to contact him about the construction schedule. *Id*. ¶ 30.

The plaintiff returned to work in May 1998 hoping that a new medication would reduce the pain to the point where she could use the stairs to the basement. Plaintiff's Aff. ¶ 15. The pain dropped to a lower level for a few weeks, but it soon became too much to tolerate. *Id*. She had to resign again. *Id*. On June 24, 1998 the commissioners accepted her resignation and voted to allow her to continue to work as a reserve officer. Defendant's SMF ¶ 34; Plaintiff's Reply SMF ¶ 34. She worked occasionally thereafter on a part-time basis. Plaintiff's Aff. ¶ 15.

By letter dated May 4, 1998 the county administrator informed the successful bidder that the county was looking "forward to an expedited construction schedule" for installation of the lift. Defendant's SMF ¶ 31; Plaintiff's Reply SMF ¶ 31. By a letter of that same date the plaintiff's attorney again requested a meeting with York County officials to discuss possible accommodations of the plaintiff's disability until the elevator was operable. Thompson Aff. ¶ 6. He received a response dated May 5, 1998 from the county administrator stating that the letter had been forwarded to the defendant's attorney "for reaction and response." *Id.* & Exh. A. The defendant's attorney did not respond to the letter. *Id.*

The plaintiff filed a charge of discrimination dated September 8, 1998 with the Maine Human Rights Commission and the Equal Employment Opportunity Commission. Defendant's SMF ¶ 36; Plaintiff's Reply SMF ¶ 36. The minutes of the county safety committee meeting on September 25, 1998 indicate that the work on the "handicap people mover" was done and that the county was waiting for a certification permit. *Id.* ¶ 43. The minutes of this committee's meeting on October 16, 1998 indicate that "[s]everal attempts have been made to contact certification people for an inspection date." *Id.* ¶ 44. The minutes of this committee's meeting on November 20, 1998 indicate that the wheelchair lift "is now fully operable." *Id.* ¶ 45.

Following a fact-finding hearing and an investigator's report, the Maine Human Rights Commission on May 21, 1999 issued a "Statement of Finding" to the effect that the county had failed to initiate an informal, interactive process with the plaintiff. *Id.* ¶¶ 48-49.

John Einsiedler, a registered architect who has inspected the three stairways that lead to the basement where the plaintiff worked, concludes that the temporary installation of a chair glide in one of those stairways was feasible. Affidavit of John W. Einsiedler (Docket No. 13) ¶¶ 1-3. Such a unit

could be leased for $125 per month, with an installation charge of $500, and installed within a few days. *Id.* ¶ 4.

III. Discussion

A. Count I

The first count of the complaint alleges a violation of the ADA. Complaint (Docket No. 1) ¶¶ 21-26. The defendant first argues that the plaintiff cannot establish a *prima facie* case under the ADA because she was not subjected to an adverse employment action by the defendant. Motion for Summary Judgment by Defendant York County ("Defendant's Memorandum") (Docket No. 5) at 4, 12. However, a plaintiff need not be subjected to an adverse employment action in order to recover under the ADA. A plaintiff may also recover when an employer fails to make a reasonable accommodation for her disability, 42 U.S.C. § 12112(b)(5)(A)[2] and *Soto-Ocasio v. Federal Express Corp.*, 150 F.3d 14, 18 (1st Cir. 1998), which is clearly the nature of the plaintiff's claim in this case. Complaint ¶¶ 21-26; Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary

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[2] Specifically, the statute provides:

> **(a) General rule**
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
>
> **(b) Construction**
>
> As used in subsection (a) of this section, the term "discriminate" includes —
>
> * * *
>
> **(5)(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .

42 U.S.C. § 12112.

Judgment ("Plaintiff's Opposition") (Docket No. 11) at 4-14. To prevail on such a claim, "an employee must show: (1) that [s]he is disabled; (2) that [s]he is qualified for the job with or without reasonable accommodation; and (3) that [s]he was denied a reasonable accommodation." *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997).

Next, the defendant contends that the plaintiff cannot establish that she is disabled within the meaning of the ADA.[3] Defendant's Memorandum at 9, 13-14. An individual is disabled as that term is defined by the ADA if she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A).[4] The complaint alleges that the plaintiff's arthritis substantially limits her major life activities of walking and climbing stairs. Complaint ¶ 9. The defendant argues that the plaintiff's ability to walk is only moderately limited by her arthritis, Defendant's Memorandum at 9 & 13-14, and that the same is true of her ability to climb stairs, *id*. at 13-14.[5] Contrary to the evidence in the cases cited by the defendant, the plaintiff here has submitted evidence that due to her arthritis, at the relevant time, "the pain became so severe that it bordered on intolerable" when she walked 100 feet, Plaintiff's Aff. ¶¶

[3] The plaintiff contends that the defendant "should be barred from arguing" that she is not disabled or not a qualified individual with a disability under the ADA because it did not raise this argument as a defense to her claim before the Maine Human Rights Commission. Plaintiff's Opposition at 4 n.2. However, the doctrine of waiver implicit in that argument does not apply in this situation where the court is not reviewing the determination of that state agency. *Brennan v. King*, 139 F.3d 258, 263 (1st Cir. 1998).

[4] The plaintiff does not rely on either of the alternative definitions provided in section 12102(2)(B) & (C).

[5] The plaintiff argues that her arthritis also creates a substantial limitation on her major life activity of working. Plaintiff's Opposition at 3-4. Her complaint does not allege such a limitation, but it is not necessary to reach this argument in any event because I conclude that there is sufficient evidence in the summary judgment record of a substantial limitation on her ability to walk to avoid the entry of summary judgment on the question of the existence of a disability.

3-4, that walking more than 100-200 feet "was just too much to take," *id*. ¶ 4, that she began to use a cane to walk even short distances, *id*. ¶ 7, and that her arthritis "significantly restricts the duration, manner, and condition under which she can walk . . . as compared to the average person in the general population's ability to perform those same activities," Rodriguez Aff. ¶ 6. Walking is a major life activity under the ADA, 29 C.F.R. § 1630.2(i); *Douglas v. Victor Capital Group*, 21 F.Supp.2d 379, 391 (S.D.N.Y. 1998), and this evidence is sufficient to show a substantial limitation, 29 C.F.R. § 1630.2(j)(1)(ii); *see Canis v. Coca-Cola Enters., Inc.*, 49 F.Supp.2d 73, 79 (D.R.I. 1999) (plaintiff substantially limited in walking when doctor determined she can walk only four hours at a time; denying summary judgment); *Driesse v. Florida Bd. of Regents*, 26 F.Supp.2d 1328, 1335 (M.D.Fla. 1998) (plaintiff stated he was unable to walk for more than half hour "without extreme discomfort" and physician stated that swelling of legs and feet is permanent and aggravated by prolonged walking; question of fact created as to whether substantially limited in major life activity of walking). There is sufficient evidence in the summary judgment record to create a disputed issue of material fact on this issue and the defendant accordingly is not entitled to summary judgment on this basis.

The defendant next argues that the plaintiff cannot establish that she was a qualified individual with a disability at the relevant time, apparently because she did not "show[] the existence of the reasonable accommodation" and request a specific accommodation at the time it became impossible for her to use the stairs to get to work. Defendant's Memorandum at 4, 8, 12-13. A "qualified individual with a disability" is one who "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds" and who, "with or without reasonable accommodation, can perform the essential functions of such position."

29 C.F.R. § 1630.2(m); 42 U.S.C. § 12111(8). The defendant does not argue that the plaintiff did not satisfy the requirements of the job she had held for eleven years or that she could not perform the essential functions of that position so long as she did not have to climb and descend stairs. It cites only *Barnett v. U. S. Air, Inc.*, 157 F.3d 744, 748-49 (9th Cir. 1998), *superseded by* 196 F.3d 979 (9th Cir. 1999), *vacated by* 201 F.3d 1256 (9th Cir. 2000), to support its contention that the plaintiff not only was required to request accommodation but that she was required to request a specific accommodation that was reasonable for the defendant to provide in order to meet this statutory requirement. *Barnett* does not support the defendant's position. The Ninth Circuit specifically disclaimed any requirement that the plaintiff must have suggested a specific accommodation to the employer at the time the limitations became known. *Id*. at 749. Rather, the Ninth Circuit required that a plaintiff, *following discovery*, "be able to point to at least one specific reasonable accommodation that was available to the employer." *Id.* All the plaintiff need do at the time the limitation becomes known is request accommodation. *Jacques v. Clean-Up Group, Inc*., 96 F.3d 506, 514 (1st Cir. 1996). The defendant is not entitled to summary judgment on this basis.

The defendant moves on to argue that the plaintiff cannot establish that it discriminated against her or that it failed to make a reasonable accommodation, because "Mrs. Littlefield was given every accommodation she asked for," apparently by the defendant's solicitation of bids for a new wheelchair lift "the same month [the plaintiff] resigned." Defendant's Memorandum at 11. Of course, this accommodation was not available for use by the plaintiff until eleven months after she first requested accommodation from her supervisor. An accommodation, to be reasonable, must be timely. *Schmidt v. Odell*, 64 F.Supp.2d 1014, 1032-33 (D.Kan. 1999); *Kent v. Derwinski*, 790 F.Supp. 1032, 1040 (E.D.Wash. 1991) (Rehabilitation Act claim); *James v. Frank*, 772 F.Supp. 984,

991 (S.D.Ohio 1991) (Rehabilitation Act claim). Making the plaintiff wait eleven months for her accommodation in circumstances where other, even if less efficient, means of accommodation were available, could not possibly be reasonable as a matter of law. To the extent that the defendant means to argue that it was not required to explore the availability of any other means of accommodation because the plaintiff only specifically requested that the existing elevator be repaired, that position rests on an incorrect interpretation of the law, as previously noted. In addition, the plaintiff's attorney clearly requested an alternative means of accommodation more than once during the eleven months, and his requests for a meeting to discuss that possibility were ignored. An obligation to engage in an interactive process seeking to identify the necessary accommodation arises once an accommodation has been requested. *Jacques*, 96 F.3d at 514; *see also Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999); *Taylor v. Phoenixville Sch. Dist.*, 174 F.3d 142, 162 (3d Cir. 1999). Here, the defendant ignored the plaintiff's request for such action. It is not entitled to summary judgment on the basis of its pursuit of the new wheelchair lift.

B. Count II

Count II alleges violation of the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq*. Complaint ¶¶ 27-32. The defendant contends that it is entitled to summary judgment on this count only because it has no liability under the ADA. Defendant's Memorandum at 15. Because it is not entitled to summary judgment on Count I, therefore, the defendant is not entitled to summary judgment on Count II.

C. Injunctive Relief

The complaint seeks injunctive relief, "enjoin[ing the defendant] from any further prohibited discrimination against" the plaintiff. Complaint at 6. The defendant seeks summary judgment on

this claim, contending that the plaintiff "cannot show a real or immediate threat that . . . she will be wronged again," because the defendant now has a fully functional wheelchair lift in place.[6] Defendant's Memorandum at 15. The plaintiff does not address this issue in her opposition. The defendant has correctly stated the legal standard, *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995), and the plaintiff offers nothing in her statement of material facts that can reasonably be interpreted to suggest that there is any likelihood that the necessary accommodation will not be available in the future or that she will be otherwise subjected to discrimination by the defendant based on her disability. Accordingly, the defendant is entitled to summary judgment on the request for injunctive relief.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED** as to the plaintiff's request for injunctive relief and otherwise **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review

[6] The defendant also states that "the Plaintiff is not as a matter of law entitled to . . . punitive damages," Defendant's Memorandum at 1, which she seeks, Complaint at 6, but offers no argument in support of this conclusory assertion. Under these circumstances, any claim for summary judgment on the request for punitive damages is deemed waived. *Business Credit Leasing, Inc. v. City of Biddeford*, 770 F.Supp. 31, 34 n.4 (D. Me. 1991).

by the district court and to appeal the district court's order.

Dated this 28th day of April, 2000.

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David M. Cohen
United States Magistrate Judge

LITTLEFIELD v. YORK, COUNTY OF Filed: 09/10/99 Assigned to: JUDGE GENE CARTER Jury demand: PlaintiffDemand: $0,000 Nature of Suit: 442Lead Docket: None Jurisdiction: Federal QuestionDkt# in other court: None Cause: 42:12101 American Disabilities ActHELEN LITTLEFIELD PETER L. THOMPSON, ESQ. plaintiff [COR LD NTC] LAW OFFICES OF RONALD COLES 62 PORTLAND ROAD P.O. BOX 1028 KENNEBUNK, ME 04043 985-6561 v. YORK, COUNTY OF WILLIAM R. FISHER defendant [COR LD NTC] WILLIAM R. FISHER, P.A. POST OFFICE BOX 6760 PORTLAND, ME 04103